Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [06/26/91]

CASE NBR: [90101379] CSY STATUS: [DECIDED]
SHORT TITLE: [Arizona]
VERSUS [Kempton, Christopher] DATE DOCKETED: [03049]

PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Mar 4 1991	D	Petition for writ of certiorari filed.
3	Mar 19 1991		Order extending time to file response to petition until May 3, 1991.
4	May 3 1991		Brief of respondent Christopher Reed Kempton in opposition filed.
5	May 7 1991		DISTRIBUTED. May 23, 1991
7	May 24 1991		REDISTRIBUTED. May 30, 1991
9	Jun 3 1991		REDISTRIBUTED. June 6, 1991
10	Jun 10 1991		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

90-1379

NO. 90-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF ARIZONA,

Petitioner,

-vs-

CHRISTOPHER REED KEMPTON,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
Attorney General of
the State of Arizona

*PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

DIANE M. RAMSEY
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)542-4686

Attorneys for PETITIONER

*Counsel of Record

QUESTION PRESENTED

If police develop information from an informant that gives them reasonable suspicion that a vehicle contains an illegal drug, may they stop the vehicle 6 hours later without a search warrant and ask the driver for consent to search?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Authorities

OPINION BELOW

The Arizona Court of Appeals reversed Respondent Kempton's convictions for possession of cocaine and drug paraphernalia holding that the failure of police to obtain a search warrant before they stopped appellant's truck was a violation of his federal Fourth Amendment rights. The court further held that respondent's consent to search the truck was tainted by the illegal stop therefore all evidence including respondent's statement should have been suppressed. The opinion is appended here as Appendix A.

STATEMENT OF JURISDICTION

The opinion of the Arizona Court of Appeals which the state asks this Court to review was filed on July 19, 1990. (Appendix A.) The Arizona Supreme Court denied the state's petition for review on January 23, 1991. (Appendix B.) This petition is filed within 90 days from that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On December 14, 1988, at approximately 12:30 a.m., Officer Nordell received information from a confidential reliable informant that respondent had attempted to sell the informant cocaine. The informant related that respondent told him he would have the cocaine with him the following day if the informant wanted to buy some then. The informant described respondent's white pickup truck and told police respondent would have the cocaine in his truck. Sometime late on December 14 or early on December 15, Officer Nordell relayed this information to Officer Hoke.

Officers Hoke and White surveilled respondent and at 7:00 a.m. on December 15, 1988, Officer White stopped respondent's truck as respondent drove to work. Officer Hoke soon arrived and

informed respondent that the police believed that he possessed narcotics. Hoke asked respondent if he would empty his pockets; respondent did so without objection. Hoke then asked for permission to look in respondent's truck; respondent said "go ahead." Hoke discovered marijuana roaches in respondent's ashtray and observed a vial containing cocaine. Hoke then questioned respondent concerning the marijuana but said nothing concerning the vial. Respondent admitted possessing the marijuana. At that point, Officer Hoke arrested respondent and read him his rights. Respondent indicated that he understood his rights and would answer questions. Hoke then returned to the truck and retrieved the vial. Respondent denied ownership of the vial but indicated that it contained cocaine.

After respondent was transported to the police station, a search of the truck revealed various drug paraphernalia, including a mirror, a picture frame, razor blades, and a small straw containing white powder. While at the police station, respondent admitted tasting the cocaine found in his truck.

At the hearing on the motion to suppress, respondent conceded that the police had probable cause to search his truck. However, he argued that since the officers had sufficient time to get a warrant they should have obtained one and their failure to do so tainted all of the evidence. The state argued that at a minimum the police had a reasonable suspicion to make an investigatory stop of the truck. Therefore, once that legal stop was made, respondent voluntarily consented to the search of his truck and

voluntarily made a statement. The trial agreed with the state's analysis and held that the police did have reasonable cause to stop respondent's vehicle. On appeal, the Arizona Court of Appeals accepted respondent's argument and held that the police should have obtained a warrant because they had the time to do so. Therefore, the court found that the illegal stop of the vehicle, tainted respondent's consent and his statement.

REASONS FOR GRANTING THE WRIT

The Arizona appellate court has misconstrued this Court's cases dealing with automobile searches and extended fourth amendment protection to areas never heretofore recognized by this Court. Underlying its opinion is the conclusion that the automobile exception for a warrantless search requires both probable cause and exigent circumstances

beyond the inherent exigency that exists due to the mobility of a vehicle and the lessened privacy expectations. Some of the federal courts, on the other hand, have read those same cases and come to the opposite conclusion. That is, so long as a vehicle search is supported by probable cause, no particular exigency beyond the inherent mobility and lessened privacy expectations of any motor vehicle need exist. United States v. Nixon, 918 F.2d 895, 903 (11th Cir. 1990); United States v. Panitz, 907 F.2d 1267 (1st Cir. 1990).

Once respondent admitted that the police had probable cause, there was no need to look for exigent circumstances. The search should have been upheld under the automobile exception to the warrant requirement. This case affords an opportunity for this Court to

definitively state whether such an exception exists.

Moreover, even assuming that the 6-hour delay between the time the officers obtained their information until they pulled respondent over did away with probable cause, there is no reason for the Arizona court to ignore the state's argument that this was a valid investigatory stop leading to a consent search. The appellate court has failed to recognize or apply the principles of Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889 (1968). In Terry, this Court determined that in some instances police could conduct limited seizures and searches (i.e., stops and frisks) without either warrant or exception. Id. In so holding, the Court provided the basis for recent cases holding that the warrant clause is

inapplicable in special situations. E.g., Michigan State Police Dept. v. Sitz, ___ U.S. ___, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (sobriety checkpoints do not violate the Fourth Amendment despite lack of individualized suspicion). See generally Wasserman, The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment, 27 American Criminal Law Review 119 (Summer 1989).

In Terry, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889 (1968), this Court ruled that police may stop and briefly detain a person for investigative purposes if they have a reasonable suspicion supported by articulable facts indicating that the person "has been, is, or is about to be engaged in criminal activity." United States v. Place, 462 U.S. 696, 702, 103 S. Ct. 2637, 2642,

77 L. Ed. 2d 110 (1983). As stated in

United States v. Hensley:

> Although stopping a car and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment, the governmental interest in investigating an officer's reasonable suspicion, based on specific and articulable facts, may outweigh the Fourth Amendment interest of the driver and passengers in remaining secure from the intrusion.

469 U.S. 227, 226, 105 S. Ct. 675, 679, 83 L. Ed. 2d 604 (1985). A tip from a confidential reliable informant can supply the necessary reasonable suspicion to stop a car. Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, 617 (1972); United States v. Gonzales, 897 F.2d 504 (10th Cir. 1990); United States v. Campo, 890 F.2d 1363 (7th Cir. 1989); "Reasonable suspicion is a less demanding standard than probable cause." Alabama v.

White, ___ U.S. ___, 110 S. Ct. 2412, 2417 (1990) (an anonymous tip, if sufficiently corroborated, can provide reasonable suspicion). Courts are to view Terry stops according to "all the circumstances surrounding the incident." United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980). In short, although police stops of automobiles invoke the fourth amendment:

> [T]he Warrant Clause of the Fourth Amendment does not apply to a 'stop.' This category of police conduct must survive only the prohibition against 'unreasonable searches and seizures.'

United States v. Mendenhall, 446 U.S. 544, 561 n.2, 100 S. Ct. 1870, 1881 n.2, 64 L. Ed. 2d 497 (1980) (Justice Powell concurring).

In reviewing the initial police stop of respondent's truck, the Arizona court

failed to apply the principles of Terry. Demonstrating the appellate court's mistaken view is its characterization of the initial police stop as an "illegal detention" and its statement that:

> The general rule requires a warrant before a search or seizure can occur unless one of the narrow exceptions to the warrant requirement applies.

(Appendix A.) These statements show that the appellate court failed to recognize that Terry made the warrant clause inapplicable in the context of investigatory police stops. If the appellate court had properly applied Terry, it would have determined that the police, in pursuing legitimate state interests, had more than a reasonable suspicion, and were justified in stopping respondent's truck.

Also problematic with the Court of Appeals' opinion is its implication that

the warrant requirement places the police under a stop watch. Even if the appellate court were correct in asserting that there are some constraints concerning when and how warrantless searches may be conducted under the automobile exception, the only time constraints regarding Terry stops are in connection with the requirement that the police must have a "reasonable" suspicion prior to the stop. If the suspicion is formed but not acted on for a great period of time then the suspicion may not remain "reasonable"; however, there is nothing regarding the 6-1/2 hour delay in this case that negates the reasonableness of the police stop. Cf. United States v. Sharpe, 470 U.S. 675, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d 605 (1985) (courts should not second guess a police officer's choice of investigative methods).

The Arizona court compounded its error by finding that respondent did not voluntarily consent to the search of his truck. The Arizona court relied upon cases dealing with illegal arrests. (Appendix A.) Stopping the vehicle was not an arrest situation. It was a valid Terry stop. Since there was no invalid seizure there was nothing to infect the consent. As this Court stated when discussing consent in Mendenhall:

> Because the search of the respondent's person was not preceded by an impermissible seizure of her person, it cannot be contended that her apparent consent to the subsequent search was infected by an unlawful detention.

446 U.S. at 553, 100 S. Ct. at 1879, 64 L. Ed. 2d at 506. The appropriate analysis, once it has been determined that there has been no constitutional violation with respect to the initial

stop, is to review all the circumstances to see if there is any other reason that could make the consent invalid. United States v. Blanco, 844 F.2d 344 (6th Cir.), cert. denied, 486 U.S. 1046 (1988); United States v. Espinosa, 782 F.2d 888 (10th Cir. 1986); United States v. Ospina, 679 F. Supp. 402 (D. Del. 1988). No such reason exists in this case.

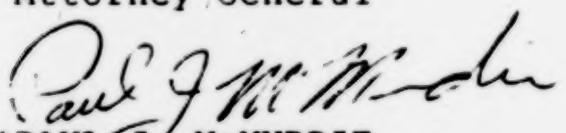
CONCLUSION

Given the existence of reasonable suspicion, the police may stop any car for further investigation. Having validly stopped a vehicle, the police are free to ask consent to search. If such consent is voluntarily and validly given then a search is constitutionally permissible. In this case, the police had reasonable suspicion and therefore justifiably stopped respondent's car. Once stopped, respondent voluntarily consented to a search of his car. The Arizona court's opinion should be vacated and the conviction reinstated.

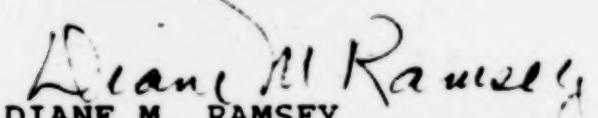
DATED this 21st day of February, 1991.

Respectfully submitted,

GRANT WOODS
Attorney General



*PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section



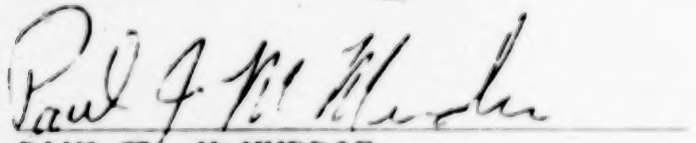
DIANE M. RAMSEY
Assistant Attorney General
Attorneys for PETITIONER

*Counsel of Record

CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed this 21st day of February, 1991, to:

MICHAEL J. DONOVAN
1763 West 24th Street
Suite 200
Yuma, Arizona 85364
Attorney for RESPONDENT



PAUL J. McMURDIE
Chief Counsel
Counsel of Record
Department of Law
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007
Telephone: (602) 542-4686

A P P E N D I C E S

Cite as
65 Ariz. Adv. Rep. 20

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE of Arizona,
Appellee,
v.
Christopher Reed KEMPTON,
Appellant.

No. 1 CA-CR 89-494
DEPARTMENT A
FILED: July 19, 1990

Appeal from the Superior Court of Yuma County, Cause No. CR-15318, The Honorable H. Stewart Bradshaw, Judge

REVERSED AND REMANDED

ATTORNEYS:

Robert K. Corbin, The Attorney General, by
Jessica Gifford Funkhouser, Chief Counsel, Criminal Division, and Mark E. Dwyer, Assistant Attorney General, Phoenix, and, David S. Ellsworth, Yuma County Attorney, by Philip Hall, Chief Deputy County Attorney, Attorneys for Appellee, Yuma

Suciu, Donovan & Schmitt, by Michael J. Donovan, Attorneys for Appellant, Yuma

---

CLABORNE, Judge

The defendant was arrested and charged with possession of cocaine, marijuana and drug paraphernalia. Before trial, he moved to suppress evidence seized during the search of his vehicle, and to exclude statements he made to the police officers during and following the search. The trial court denied the motion after an evidentiary hearing. The evidence and statements were subsequently admitted during his trial. The jury found the defendant guilty of possession of cocaine and drug parphernalia.[1] The court placed the defendant on supervised probation for three years. The defendant timely appealed. In his appeal, the defendant challenges the legality of the police action in stopping and searching his truck.

Because we find that the police were not justified in stopping the defendant and searching his truck without first obtaining a warrant, we reverse and remand for further proceedings.

FACTS

The following events occurred in the small community of Somerton, Arizona, which is a few miles south of Yuma, Arizona. On December 15, 1988, at approximately 12:30 a.m., Agent Daniel Nordell, a member of a drug enforcement task force called Southwest Border Alliance, received information from a "confidential reliable informant." The informant told Agent Nordell that the defendant had offered to sell the informant cocaine during the day of December 14, 1988. The informant stated that he had seen the cocaine in defendant's 1985 white

Toyota truck. The informant also told Agent Nordell that the defendant would have the cocaine in his truck when he went to work the following morning. Although the informant did not refer to any specific amount, it was clear to Agent Nordell that it was a small amount of cocaine.

Agent Nordell relayed all of this information to Agent Juan Hoke, another member of the task force, immediately after the informant's phone call. At that time, Agents Nordell and Hoke discussed the need for a search warrant, but they decided not to get one. Agent Nordell testified about their conversation:

> Q. Dan, you and Hoke talked about whether or not a search warrant would be required in this case when you talked to him? Right?
>
> A. We discussed the idea of a search warrant briefly.

Q. And the decision was made that you were not going to get a search warrant between you and Hoke? Right?

A. Right.

Q. And that conversation was when you spoke with Hoke the night before between the hours of twelve and one?

A. Again, I am not real sure about the times, right now, but it was during the only discussion we had prior to the stop of Mr. Kempton.

. . .

Q. Now, concerning your discussion with Hoke about the search warrant, in this case you are not processing -- at least were at that time feeling that you were dealing with a relatively small amount of narcotics, someone who was referred to as a relatively small dealer, and you felt you had enough probable cause and decided to just stop and check his vehicle? Right?

A. Basically.

Q. And you discussed with me the thought processes behind that on the twenty eighth of February? Right?

A. Yes, sir.

Q. And you told me that, when you get a report that here is a vehicle out running around, that one of your reliable informants has seen some narcotics in, and you haven't been able to get a registration check to the vehicle, if we find that vehicle, we will stop it, and the person will be asked if he will let you take a look, and you said it's always nicer to get a consent search than to have to do it the hard way? We always ask them if they mind if we search? Did that about cover it?

A. It was in response of [sic] your statement about Mr. Kempton giving a consent of the vehicle, yes.

Q. But you were giving a general view of how you handled it there? Right?

A. I was responding that we always ask for a search of the vehicle.

Agent Hoke testified that between 12:30 a.m. and approximately 7:00 a.m., there were three magistrates available in the area to issue a search warrant and that a warrant could have been obtained in an hour or less. When Agent Hoke was asked

if he had thought about getting a search warrant after the search had occurred, he responded, "No. I had no -- I did not think of getting a search warrant prior nor after."

At 7:00 a.m., on December 15, Agent Hoke watched the defendant leave his residence for work in the white Toyota truck described by the informant. Agent Hoke was acquainted with the defendant and was familiar with the truck. He contacted Officer White of the Somerton Police Department and asked Officer White to stop the defendant's truck and "make it look like a traffic stop." Based on Agent Hoke's instruction, Officer White turned on his overhead emergency lights and followed the normal police procedure for stopping a vehicle. Officer White testified that the defendant had not committed a traffic violation,[2] and

that the defendant was not under the influence of drugs or alcohol at the time of the stop. The traffic stop was made solely on the orders of Agent Hoke who had told Officer White that he, Hoke, had probable cause to believe that the defendant had drugs in the truck.

Officer White asked the defendant to step out of the truck. When the defendant asked Officer White why he was being stopped, Officer White responded that Agent Hoke wanted to speak to him regarding possession of illegal drugs. Agent Hoke immediately arrived and advised the defendant that he had probable cause to believe that the defendant was in possession of illegal drugs.

Agent Hoke asked the defendant if he would mind emptying his pockets. The defendant did so, but no narcotics were

found. Agent Hoke then asked for permission to look in the defendant's vehicle. The defendant replied, "Go ahead. You are not going to find nothing."

Upon inspecting the truck, Agent Hoke found four burnt marijuana cigarettes in the ashtray. The defendant was placed under arrest and advised of his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The defendant stated that he understood his rights and did not mind answering questions. Agent Hoke asked the defendant about the marijuana cigarettes, and he admitted that they were his.

Agent Hoke then went back into the truck, searched, and found a small vial containing a powder-like substance which he suspected was cocaine. The defendant

stated that he knew what was in the vial, but denied knowing how it got in his truck.

After the arrest, the defendant was taken to the Somerton Police Department. He was not handcuffed. He was allowed to smoke and to make as many phone calls as he wanted. During this period, an officer assigned to watch the defendant asked him if he knew what was in the vial. The defendant responded that he knew the vial contained cocaine because he had tasted it, that the cocaine was not his, and that he did know that it was in the truck.

During the search of the defendant's truck at the police station, the officers found a small straw with white residue along with a straight razor blade. The defendant later signed a statement admitting that the marijuana cigarettes

were his and that the cocaine had been left in his truck.

DISCUSSION

The defendant contends that the stop and search of his vehicle were illegal and that the evidence discovered as a result of that search should have been suppressed. He argues further that the statements made after the search should have been suppressed because they were the "fruits" of the illegal stop and search of the defendant's vehicle.

The state's position is that since the agents had a reasonable suspicion that the defendant's vehicle contained narcotics, they could stop the vehicle to inquire whether the driver would consent to a search of the car.

We must answer two questions. First, were the defendant's fourth amendment rights violated when the agents, who had

approximately six and one-half hours to obtain a warrant, made a warrantless stop of the defendant's truck based solely on reliable information from an informant that the defendant's truck contained illegal contraband? And second, if such a stop was a fourth amendment violation, was a subsequent "consent search" of the defendant's person and truck valid?

THE WARRANTLESS STOP

The starting point of this inquiry is the fourth amendment to the federal constitution.[3] The basic constitutional rule is that a search or seizure is per se unreasonable unless it is supported by a warrant or falls within one of the few specifically established and well-delineated exceptions to the constitutional warrant requirement. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967).

See also Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2031-32, 29 L.Ed.2d 564 (1971); State v. Sardo, 112 Ariz. 509, 513, 543 P.2d 1138, 1142 (1975). These exceptions must be narrowly tailored to the circumstances that justify their creation. Florida v. Royer, 460 U.S. 491, 499-500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983); Chimel v. California, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969); Terry v. Ohio, 392 U.S. 1, 19, 25-26, 88 S.Ct. 1868, 1878-79, 1882, 20 L.Ed.2d 889 (1968). If special circumstances exist, the resulting search or seizure must occur only at the time in which those circumstances are present, and must be as short in duration as possible. See

Coolidge, 403 U.S. at 458-64; Royer, 460 U.S. at 500. See also Terry, 392 U.S. at 25-26.

One of the exceptions to the warrant requirement is based, in part, upon the impracticability of obtaining a warrant to search an automobile. Carroll v. United States, 267 U.S. 132, 159-60, 45 S. Ct. 280, 287, 69 L.Ed. 543 (1925). In Carroll, the Court recognized that, because of the nature of an automobile in transit, an immediate intrusion may be necessary if police officers are to secure the illicit substance. United States v. Ross, 456 U.S. 798, 806-07, 102 S.Ct. 2157, 2163, 72 L.Ed.2d 572 (1982)(citing Carroll, 267 U.S. at 153).[4] The Court held that a warrantless search of an automobile is legal if probable cause exists to believe "that an automobile or other vehicle

contains that which by law is subject to seizure and destruction." Carroll, 267 U.S. at 149. See also State v. Axley, 132 Ariz. 383, 390-91, 646 P.2d 268, 275-76 (1982).

The reason for carefully-crafted exceptions to the warrant requirement is found in the purpose of the fourth amendment.[5] Prior review by a detached and neutral magistrate before the issuance of a search warrant limits the power held by executive officers over the individual citizen and prevents unjustified searches from occurring at all. United States v. United States Dist. Court, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136-37, 32 L.Ed.2d 752 (1972). Furthermore, it helps "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." United States v. Martinez-Fuerte, 428

U.S. 543, 565, 96 S.Ct. 3074, 3086, 49 L.Ed.2d 1116 (1976). We must keep firmly in place the principle that police whenever practicable must obtain advance judicial approval of searches and seizures through the warrant process. See, e.g., Katz, 389 U.S. at 356-57; Chapman v. United States, 365 U.S. 610, 613-17, 81 S.Ct. 776, 778-80, 5 L.Ed.2d 828 (1961).

The exigencies which create the automobile exception are the lack of time to get a warrant and the mobility of the vehicle. Coolidge, 403 U.S. at 459-65. See also Axley, 132 Ariz. at 391, 646 P.2d at 276. Those exigencies were not present in this case. The officers had six and one-half hours to obtain a warrant without any apparent fear that the truck would flee the jurisdiction. They knew the defendant, where he lived,

the vehicle that he drove, and the place where he worked. The information provided to the officers suggested, in fact, that the defendant would remain in Somerton. There was no reason to stop the defendant except to ask for his consent to search his truck on the grounds that the agents believed that they had probable cause that the defendant possessed illegal drugs. Any one of three magistrates could have issued a warrant in less than an hour if there was probable cause to support such a warrant.[6] The only reasons the agents gave for not obtaining a warrant were that the amount of cocaine was small, that the defendant was not a major dealer, and that "it's always nicer to get a consent search than to have to do it the hard way." The ease and importance of obtaining a search warrant

undercuts the justification for warrantless searches based on exigent circumstances.[7]

The record reflects that stopping a vehicle and asking for consent to search was not an unusual procedure for these agents. If the request for permission to search was denied, then the police would determine if it was practical to get a warrant.

The general rule requires a warrant before a search or seizure can occur unless one of the narrow exceptions to the warrant requirement applies. Police may conduct a warrantless search and seizure of a vehicle when they are confronted by emergencies and exigencies which do not allow time to allow a judicial officer to evaluate and act upon applications for a warrant supported by probable cause. Chambers v. Maroney, 399

U.S. 42, 51, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970). See also Axley, 132 Ariz. at 391, 646 P.2d at 276 (1982).

Because Agent Hoke and Officer White had ample time to obtain a warrant, we find that they were not justified in stopping and searching the defendant without first obtaining a warrant.

CONSENT TO SEARCH

The position of the state, however, goes further. Even if the stop was not legal, says the state, the consent to search given by the defendant was voluntary and no arrest occurred until contraband was discovered as a result of the voluntary consensual search. Therefore, the evidence was admissible. This is not the law as applied to these facts.

Immediately after the defendant was stopped by Officer White and told to get

out of his vehicle, Agent Hoke arrived on the scene. He told the defendant that he had probable cause to believe that the defendant was in possession of illegal drugs, and asked the defendant if he could look in his truck. The defendant had no objection.

Even if we assume that the consent to search by the defendant was voluntary, the evidence found as a result of that consent must be suppressed if the unconstitutional conduct in stopping the vehicle is not sufficiently attenuated from the subsequent seizure. Brown v. Illinois, 422 U.S. 590, 602-04, 95 S.Ct. 2254, 2261-62, 45 L.Ed.2d 416 (1975). See also Dunaway v. New York, 442 U.S. 200, 216, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824 (1979); United States v. Taheri, 648 F.2d 598, 601 (9th Cir. 1981). In other words, the unconstitutional acts of an

officer taint a consensual search unless there are sufficient intervening circumstances between the unlawful conduct and the consent to truly show that is was voluntary.

Although Brown dealt with the exclusion of a defendant's statements, it applies equally to contraband revealed by the consent search. Taheri, 648 F.2d at 601. The reason for the rule is to make sure that there is no causal connection between the unconstitutional conduct and the consent to search or the giving of inculpatory statements. When the connection between the unconstitutional conduct and the search is close, not only is the exclusion of the evidence more likely to deter similar police action, but the use of such evidence is more likely to compromise the integrity of the system. As a result, Brown requires us

to review three factors in analyzing the circumstances surrounding the consent: First, the "temporal proximity" of the unconstitutional conduct and the consent; second, the presence of any intervening circumstances; and finally, the purpose and flagrancy of the official misconduct. The first two certainly deal with causal remoteness, and the last deals with broad general policy which would justify the exclusion of the evidence. See United States v. Johnson, 626 F.2d 753, 758 (9th Cir. 1980), aff'd, 457 U.S. 537 (1982).

Under this analysis, because the search occurred almost immediately after Officer White stopped the defendant, there was temporal proximity between the unconstitutional conduct and the consent. There were no intervening circumstances between the police conduct

and the consent. In addition, the misconduct by the police was clear. Agent Nordell felt that since the defendant was a "small dealer" with a small amount of contraband, the effort of obtaining a warrant was not palatable. Agent Hoke, when asked, simply did not even think about a warrant. The stop was made to obtain a consent search, and for no other reason. This type of conduct is exactly what the exclusionary rule was designed to deter. When police purposely effect an illegal detention in the hope that a consent search or custodial interrogation will yield incriminating evidence and statements, the exclusionary rational is especially compelling. See United States v. Perez-Esparza, 609 F.2d 1284, 1289-90 (9th Cir. 1979).

Therefore, we hold that the defendant was unconstitutionally detained without a

warrant and that the consent search and the statement made to the officers were not sufficiently attenuated to prevent the exclusion of the evidence.

We reverse and remand for further proceedings consistent with this opinion.

JOHN L. CLABORNE Presiding Judge, Department A

CONCURRING:
SUSAN A. EHRLICH, Judge
THOMAS C. KLEINSCHMIDT, Judge

---

1. The court dismissed the charge of possession of marijuana due to insufficient quantity.

2. The facts in this record do not support an argument under the rationale of pretextual searches. See United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988). There was no pretext of any kind by White when he stopped Kempton's vehicle.

3. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

4. Although mobility of the automobile, as reflected in Carroll, was the original reason for the exception, later cases dealing with other aspects of warrantless searches have observed that the expectation of privacy is less in automobiles than in a home or office. California v. Carney, 471 U.S. 386, 393-94, 105 S.Ct. 2066, 2070-71, 85 L.Ed.2d 406 (1985); South Dakota v. Opperman, 428 U.S. 364, 367-69, 96 S.Ct. 3092, 3096-97, 49 L.Ed.2d 1000 (1976). See also United States v. Chadwick, 433 U.S. 1, 12-13, 97 S.Ct. 2476, 2484, 53 L.Ed.2d 538 (1977). The facts here do not require us to examine the application of this reasoning.

5. Justice Jackson, writing for the Court in Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948), stated:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence

> sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers....

6. "In lieu of a written affidavit, the magistrate may take an oral statement under oath which shall be recorded on tape.... The statement may be given in person to the magistrate, or by telephone, radio, or other means of electronic communication. This statement shall be deemed to be an affidavit for the purposes of the issuance of a search warrant." A.R.S. § 13-3914(C). See State v. Hadd, 127 Ariz. 270, 619 P.2d 1047 (1980).

7. The following comment is important when discussing the degree of exigency of the circumstances that compel warrantless conduct:

> The availability of a search warrant via telephone or other electronic means obviates much of the claimed exigency justification for a warrantless search for objects.... Administrative obstacles heretofore cited for not securing a search warrant by appearing before a magistrate must now be examined in a different light. Such factors as the distance from a magistrate, the time required to appear before a magistrate, the normal business

> hours of a magistrate, the inconvenience of securing and dispatching additional agents to appear before a magistrate are now less determinative in justifying the exception. A magistrate, and a search warrant, can be as close as the nearest telephone or mobile radio. The mobility, and thus the risk of loss, of the object to be searched and property to be seized is reduced in importance.

Marke, Telephonic Search Warrants: A New Equation for Exigent Circumstances, 27 Clev. St. L. Rev. 35, 38 (1978).

SUPREME COURT
STATE OF ARIZONA
201 WEST WING STATE CAPITAL
1700 WEST WASHINGTON
PHOENIX, ARIZONA 85007-4536

TELEPHONE: (602) 542-4536

NOEL K. DESSAINT
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

January 24, 1991

RE: STATE OF ARIZONA vs. CHRISTOPHER REED KEMPTON
Supreme Court No. CR-90-0292-PR
Court of Appeals No. 1 CA-CR 89-494
Yuma County No. CR-15318

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 23, 1991, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED

Record returned to Court of Appeals, Division One, Phoenix, this 24th day of January, 1991.

NOEL K. DESSAINT, Clerk

TO:

Hon. Grant Woods, Attorney General 1275 West Washington, Phoenix, AZ 85007
ATTN: Mark E. Dwyer, Esq.

David S. Ellsworth, Esq., Yuma County Attorney, P.O. Box 1048, Yuma, AZ 85364
ATTN: Philip L. Hall, Esq.

Michael J. Donovan, Esq., Suciu, Donovan & Schmitt, 1763 West 24th St., Suite 200, Yuma, AZ 85364

Glen D. Clark, Clerk, Court of Appeals, Division One, First Floor, State Capitol, Phoenix, AZ 85007

(2)

No. 90-1379

In The

Supreme Court of the United States

October Term, 1990

STATE OF ARIZONA,

Petitioner,

v.

CHRISTOPHER REED KEMPTON,

Respondent.

Petition For Writ Of Certiorari To The Arizona Court Of Appeals

BRIEF IN OPPOSITION

MICHAEL J. DONOVAN
SUCIU, DONOVAN & SCHMITT
1763 W. 24th St., Ste. 200
Yuma, Arizona 85364
(602) 726-6892
Counsel for Respondent
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATEMENT OF THE CASE

Several facts pertinent to the issue in this case and omitted from the petition are set forth herein. On December 15, 1988, at approximately 12:30 a.m., Agent Daniel Nordell, a members of a drug enforcement task force called Southwest Border Alliance, received information from a "confidential reliable informant" that this respondent had offered to sell the informant cocaine during the day of December 14, 1988. The informant stated that he had seen the cocaine in respondent's 1985 white Toyota truck. Although there was no specific discussion between informant and Agent Nordell as to the amount of the cocaine, it was the clear understanding of Agent Nordell that it was a small amount. Agent Nordell relayed all of this information to Agent Juan Hoke, another member of the task force, immediately after the phone call whereupon Agents Nordell and Hoke discussed the need for a search warrant, but decided not to get one.

As noted in the hearing testimony Agent Nordell testified, in part, as follows:

> "Q. And you told me that, when you give a report that there is a vehicle out running around, that one of your reliable informants has seen some narcotics in, and you haven't been able to get a registration check to the vehicle, if we find that vehicle, we stop it, and the person will be asked if he will let you take a look, and you said it's always nicer to get a consent search than to have to do it the hard way? We always ask them if they mind if we search? Did you about cover it?
>
> A. (Agent Nordell) It was in response of (sic) your statement about Mr. Kempton giving a consent of the vehicle, yes.

Q. But you were giving a general view of how you handled it there? Right?

A. I was responding that we always ask for a search of the vehicle."

During said hearing Agent Hoke testified that between 12:30 a.m. and approximately 7:00 a.m. there were three magistrates available in the area to issue a search warrant and that a warrant could have been obtained in an hour or less.

At 7:00 a.m. on December 15, Agent Hoke watched the respondent leave his residence for work in a white Toyota-truck. Agent Hoke was acquainted with the respondent and was familiar with his truck. He had contacted Officer White of the Somerton Police Department and asked Officer White to stop the respondent's truck and "make it look like a traffic stop". Based on Agent Hoke's instruction, Officer White turned on his overhead emergency lights and followed the normal police procedure for stopping a vehicle. Officer White testified that the defendant had not committed a traffic violation, and that the defendant was not under the influence of drugs or alcohol at the time of the stop. The traffic stop was made solely on the order of Agent Hoke who had told Officer White that he, Hoke, had probable cause to believe that the respondent has drugs in his truck.

Officer White asked the respondent to step from the truck. When Officer White was asked by the defendant why he was stopped he responded that Agent Hoke wanted to speak to him regarding possession of illegal drugs. Agent Hoke immediately arrived and advised the defendant that he had probable cause to believe that the respondent was in possession of illegal drugs. He then

asked the respondent if he would mind emptying his pockets. The respondent did so but no narcotics were found. Agent Hoke then asked for permission to look in the respondent's vehicle. The respondent replied, "go ahead, you're not going to find nothing."

SUMMARY OF THE ARGUMENTS PRESENTED

The Court of Appeals, State of Arizona, Division One, determined that the respondent was unconstitutionally detained without a warrant and that the consent search and the statement made to the officers were not sufficiently attenuated to prevent the exclusion of the evidence. The Court of Appeals' opinion is entirely consistent with *United States v. United State District Court*, 407 U.S. 297, 317, 92 S.Ct. 2125, 2126-37, 32 L.Ed.2d 752 (1972) and *United States v. Martinez-Fuertes*, 428 U.S. 543, 565, 96 S.Ct. 3074, 3086, 49 L.Ed.2d 1116 (1976). The exigencies which create the automobile exception are the lack of time to get a warrant and the mobility of the vehicle. This is a carefully crafted exception to the constitutional warrant requirement and must be narrowly tailored to the circumstances that justify its creation.

REASONS FOR DISALLOWANCE OF WRIT

LAW ENFORCEMENT WAS NOT JUSTIFIED IN STOPPING THE RESPONDENT AND SEARCHING HIS TRUCK WITHOUT FIRST OBTAINING A SEARCH WARRANT.

The Court of Appeals, State of Arizona Division One, has reviewed the automobile warrant exception and its applicability to the Respondent's case. Said Court has clearly enunciated its reasoning and identified with particularity the circumstances which render the automobile warrant exception inapplicable.

Each of the specifically established and well delineated exceptions to the constitutional warrant requirement must be narrowly tailored to the circumstances that justify their creation. *Florida v. Royer*, 460 U.S. 491, 499-500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 329 (1983); *Chimel v. California*, 395 U.S. 752, 762-763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969); *Terry v. Ohio*, 392 U.S. 1, 19, 25-26, 88 S.Ct. 1868, 1878-79, 1882, 20 L.Ed.2d 889 (1968). It is the time of such special circumstances which is an issue in respondent's case.

The automobile exception as noted by petitioner is based, in part, upon the impracticability of obtaining a warrant to search an automobile. *Carroll v. United States*, 267 U.S. 132, 159-60, 45 S.Ct. 280, 287, 69 L.Ed.2d 543 (1925). Therein, the court held that a warrantless search of an automobile was legal if probable cause existed to believe "that an automobile or other vehicle contains that which by law is subject to seizure and destruction." *Carroll*, 267 U.S. at 149. Such circumstances must be balanced with the essential constitutional requirement that police procure a warrant prior to a search.

Herein the Court of Appeals noted that basic exigencies which apply to the automobile warrant exception simply did not exist in respondent's case. Said exigencies being lack of time to obtain a warrant and mobility of a vehicle. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The information that respondent had been in possession of a narcotic drug at some time on December 14, 1988 was provided 6½ hours prior to the search of respondent's truck. The record clearly reflects that neither Agent Nordell nor Hoke were in the slightest fear of respondent fleeing the jurisdiction. Further, Agent Hoke was acquainted with the respondent and familiar with his truck, knew where respondent lived as well as where he worked. The limited information provided to Agent Nordell strongly suggested that the respondent would remain in the small community of Somerton where he resided and worked.

In this small community there exists simplified procedures for obtaining a search warrant based on exigent circumstances. Such a search warrant may be obtained in less than an hour from any of three magistrates who are energetic and willing to assist law enforcement with such matters. This, of course, presumes that there is probable cause to support such a warrant. Probable cause which would have been reviewed by a detached and neutral magistrate before the issuance of any search warrant. *United States v. United States District Court*, 407 U.S. at 317. Such an expeditious search warrant procedure clearly minimizes the inconvenience to law enforcement but maximizes the prevention of hindsight from coloring the evaluation of the reasonableness of the search and seizure. *United States v. Martinez-Fuertes*, 428 U.S. at 565.

In lieu of taking advantage of the expeditious procedures for obtaining a search warrant in Somerton, Arizona, the record reflects that the agents in question implemented a regular practice of simply stopping a vehicle and asking for consent to search. If in fact such consent was denied then the officers would determine if it was practical to get a warrant. The apparent reasoning by the agents in question was that small drug cases are commensurate with lessor constitutional rights. Such is not the case, a warrant is required before search or seizure can occur unless one of the exceptions to the no requirement applies. Herein the warrantless search of the respondent's vehicle is not authorized by the existence of any emergency or exigencies which would not allow a judicial officer to evaluate and act upon applications for a warrant. *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970). The Arizona Court of Appeals' conclusion that the law enforcement officers were not justified in stopping and searching the respondent herein is supported by the record.

The Arizona Court of Appeals further reviewed the consent as given by the respondent and determined that the constitutional conduct in stopping the vehicle was not sufficiently attenuated from the subsequent seizure to characterize the consent as being voluntary. *Brown v. Illinois*, 422 U.S. 590, 602-04, 95 S.Ct. 2254, 2261, 62, 45 L.Ed.2d 416 (1985). In that the search occurred almost immediately after Officer White stopped the respondent, there was a temporal proximity between the unconstitutional conduct and the consent. Furthermore, there were no intervening circumstances between the police conduct and the consent. Lastly, the misconduct by the police was

clear. Agent Nordell felt that since the defendant was simply a small dealer with a small amount of contraband, the effort of obtaining a warrant was not palatable. There can be no conclusion other than that the stop was made to obtain a consent search and for no further reason. Accordingly, the circumstances surrounding consent were appropriately characterized by the Court of Appeals as unconstitutional conduct. *United States v. Taheri*, 648 F.2d 598, 601 (9th Cir. 1981).

As noted in the Arizona Court of Appeals opinion "when police purposely effect an illegal detention in the hope that a consent search or custodial interrogation will yield incriminating evidence and statements, the exclusionary rationale is especially compelling. See *United States v. Perez-Esparza*, 609 F.2d 1284, 1289-90 (9th Cir. 1979)." The Court of Appeals' decision is well considered and consistent with the basic constitutional rule that a search or seizure is per se unreasonable unless it is supported by a warrant or falls within one of the few specifically established and well delineated exceptions to the constitutional warrant requirement. Such exceptional circumstances were not present based upon the facts of record and accordingly the granting of a Petition of Writ of Certiorari should be denied.

CONCLUSION

No interest is served by granting the Petition for Writ of Certiorari. The factual record is clear and concise and supports the Court of Appeals', State of Arizona, decision. The exceptions to the constitutional warrant

requirement must be narrowly tailored to the circumstances that justify their creation. Herein, the exigencies which have lead to the creation of the automobile exceptions are nonexistent in the facts of record. Furthermore, the unconstitutional conduct in stopping the respondent's vehicle in a manner consistent with "convenient" law enforcement was not sufficiently attenuated from the subsequent seizure and tainted the consensual search of respondent's vehicle. The exclusion of evidence in respondent's case was appropriate and should not be set aside.

Respectfully Submitted,

MICHAEL J. DONOVAN
SUCIU, DONOVAN & SCHMITT
1763 W. 24th St., Ste. 200
Yuma, Arizona 85364
(602) 726-6892
Counsel for Respondent
Counsel of Record

SUPREME COURT OF THE UNITED STATES

ARIZONA *v.* CHRISTOPHER REED KEMPTON

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

No. 90-1379. Decided June 10, 1991

The petition for a writ of certiorari is denied.

JUSTICE WHITE dissenting from the denial of certiorari.

In this case, a reliable informant told police that respondent had cocaine in his truck. Several hours later, the police stopped respondent while he was driving his truck, asked for and received permission from respondent to search the truck, and discovered cocaine. Respondent was subsequently convicted, but the Arizona Court of Appeals reversed the conviction, holding that the search of respondent's truck was illegal because it did not fall within the automobile exception to the warrant requirement and was not conducted pursuant to a valid investigatory stop. 166 Ariz. 392, 803 P. 2d 113 (1990). The Arizona Supreme Court denied discretionary review.

The Arizona Court of Appeals' holding in this case is contrary to relevant decisions of this Court, see, *e. g.*, *United States* v. *Hensley*, 469 U. S. 221, 226–229, 232 (1985); *Alabama* v. *White*, 496 U. S. —— (1990); *California* v. *Carney*, 471 U. S. 386, 392 (1985); *Michigan* v. *Thomas*, 458 U. S. 259, 261 (1982), and should be reversed. That the decision below was rendered by an intermediate state appellate court should make no difference. The trend in state supreme courts towards discretionary review has resulted in the intermediate state appellate courts taking on a large and significant role in the development and application of state and federal law in their respective jurisdictions. This Court should not deny review on the basis of an outdated perception of the role of state intermediate appellate courts.